UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. SOCORRO CAMPOS-GUTIERREZ, Defendant.	NO. **CR-10-6020-LRS** **MEMORANDUM OPINION RE SENTENCING**

I. EIGHT LEVEL ENHANCEMENT PURSUANT TO U.S.S.G. §2L1.2(b)(1)(C)

The Defendant objects to the pre-sentence report's (PSIR's) proposed eight level enhancement to his Base Offense Level pursuant to the Sentencing Guidelines, U.S.S.G. Section 2L1.2(b)(1)(C). The PSIR concludes that Defendant's June 1999 Pasco Municipal Court conviction for Theft is an "aggravated felony" and therefore, the enhancement is justified. Defendant received a sentence of 365 days jail, all of which was suspended.

An "aggravated felony" has the meaning given that term in 8 U.S.C. Section 1101(a)(43). Application Note 3(A) to U.S.S.G. Section 2L1.2. 8 U.S.C. Section 1101(a)(43)(G) specifies that an "aggravated felony" includes "a theft offense (including receipt of stolen property) or burglary offense **for which the term of imprisonment [is] at least one year**." (Emphasis added). Defendant contends he did not receive a "term of imprisonment [of] at least one year" because all of his sentence was suspended. In doing so, he relies on U.S.S.G. Section 4A.1(2)(b)

and Application Note 2 related thereto. The problem is that Defendant seeks to use a definition of "imprisonment" from Chapter 4 of the Guidelines related to "Criminal History" instead of the definition of "imprisonment" from Chapter 2 of the Guidelines related to "Offense Conduct." The eight level enhancement is a Chapter 2 enhancement. It has nothing to do with criminal history computation and indeed, pursuant to U.S.S.G. Section 4A1.2(e)(3), Defendant received "0" criminal history points for this Theft conviction.

In *United States v. Echavarria-Escobar*, 270 F.3d 1265 (9th Cir. 2001), the Ninth Circuit rejected the very argument Defendant attempts to make here:

> Echavarria also cites to U.S.S.G. §4A1.2, Application Note 2 to support his argument that a defendant must actually serve a period of imprisonment on a sentence to qualify as a sentence of imprisonment. This argument misapprehends § 4A1.2. Because "[s]ection 4A1.2(b) . . . is for the purpose of computing a defendant's criminal history category, . . . U.S.C. § 1101(a)(48)(B), not U.S.S.G. § 4A1.2(b) applies for the purposes of defining 'term of imprisonment' in U.S.S.G. § 2L1.1."

Id. at 1270-71, quoting *U.S. v. Tejada-Perez*, 199 F.3d 981, 982 (8th Cir. 1999). Moreover, the Ninth Circuit agreed with prior holdings in the First, Second, Third, Fifth, Eighth, Tenth, and Eleventh Circuits and made it unambiguously clear that "whether a defendant's sentence was suspended is immaterial when determining whether a suspended sentence meets the aggravated felony requirements of [8 U.S.C.] § 1101(a)(43)." *Id*. at 1270. The Ninth Circuit held "the reference to 8 U.S.C. § 1101(a)(43) in the commentary to U.S.S.G. § 2L1.2 not only incorporates § 1101(a)(43)'s definition of aggravated felony, but also 8 U.S.C. § 1101(a)(48)(B)'s unambiguous supplement to that definition." *Id*. at 1271. Section 1101(a)(48)(B) provides:

> Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law **regardless of any suspension of the imposition or execution of that imprisonment in whole or in part.**

(Emphasis added). Thus, the fact Defendant here received a fully suspended

sentence is irrelevant. That fully suspended sentence constitutes a "term of imprisonment."

Defendant contends his "term of imprisonment" was not "at least one year" because it was a sentence "during a leap year." Although 1999 was not a leap year, the year 2000 was and consisted of 366 days instead of 365 days. Defendant's sentence commenced on June 15, 1999, when it was imposed, and expired 365 days later on June 14, 2000. The sentence expired a day earlier than usual because of the additional day in a leap year, that being February 29, 2000. It appears Defendant was convicted of Third Degree Theft, RCW 9A.56.050, a gross misdemeanor, punishable by a maximum term of not more than one year. RCW 9A.20.021(2). The maximum term of one calendar year was imposed, that being 365 days, albeit suspended. "When an inmate is incarcerated for a term of years, it makes no difference that a year contains 365, or in the case of a leap year, 366 days." *Yokley v. Belaski*, 982 F.2d 423, 425 (10th Cir. 1992). Defendant received a suspended sentence of "at least one year."

Furthermore, even assuming the sentence imposed was a "term of days," the court finds it still constitutes "at least a year." The court is not persuaded that the fact roughly half of the term was served during a leap year makes the term anything less than a full calendar year. Defendant's argument might be more persuasive if his sentence had commenced on January 1, 2000 and expired 365 days later on December 30, 2000, one day short of the full calendar year of 2000 comprised of 366 days.

Finally, holding that 365 days does not constitute a calendar year when a term of imprisonment encompasses a portion of a leap year, including February 29, is troubling for the reason cited by the *Yokley* court: "Although the Gregorian calendar is less than perfect, it is a pervasive tool in the ordering of our daily lives. Were we to require greater exactitude, there would be no end to the claims that could be brought." *Yokley*, 982 F.2d at 425, n. 1.

Defendant was convicted of an "aggravated felony" for which the "term of imprisonment [was] at least one year." Accordingly, in sentencing the Defendant, it was appropriate for the court to use the Guideline calculations contained in the PSIR which resulted in a Guideline range of 21-27 months.

II. DOWNWARD DEPARTURE UNDER THE GUIDELINES

Defendant asks for a downward departure based on cultural assimilation. A sentencing court has authority under U.S.S.G. Section 5K2.0 to consider evidence of cultural assimilation as a basis for downward departure. A departure is appropriate where the defendant's unusual cultural ties to the United States, rather than ordinary economic incentives, provided the motivation for defendant's illegal reentry or continued presence in the United States. The circumstances must be "extraordinary." *United States v. Lipman*, 133 F.3d 726, 730-31 (9th Cir. 2004). "Under *Lipman*, cultural assimilation remains a proper basis for granting a downward departure in 8 U.S.C. § 1326 cases for persons brought to the United States as children, who had adapted to American culture in a strong way and who, after deportation, returned to the United States for cultural rather than economic reasons." *United States v. Rivas-Gonzalez*, 384 F.3d 1034, 1044 (9th Cir. 2004). There is no information indicating this Defendant was brought to the United States by his parents. Although the court does not depart downward pursuant to U.S.S.G. Section 5K2.0, it has taken Defendant's ties to the United States into account in its consideration of the 18 U.S.C. Section 3553(a) non-guideline factors

Defendant's criminal history is not over-represented. His 1999 Theft conviction in Pasco Municipal Court received no criminal history points and has no impact on computation of his criminal history category under the sentencing guidelines. The nature of that offense, as well as all of the Defendant's other criminal history, is taken into account in consideration of the 18 U.S.C. Section 3553(a) factors.

Rather than granting a departure under the sentencing guidelines, the court has granted a "variance" based on the Section 3553(a) factors.

The District Court Executive shall provide copies of this memorandum opinion to counsel and to the U.S. Probation Office.

DATED this 5th day of November, 2010.

s/Lonny R. Suko

LONNY R. SUKO
Chief U. S. District Court Judge